

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

UNITED PUBLIC WORKERS, AFSCME,
LOCAL 646, AFL-CIO,

Petitioner,

and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO; CLAYTON A. FRANK, Director,
Department of Public Safety, State of Hawaii;
HARRY KIM, Mayor, County of Hawaii; and
GORDON LESLIE,

Intervenors.

CASE NO: DR-10-94

DECISION NO. 472

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND DECLARATORY
ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECLARATORY ORDER

On September 13, 2007, Petitioner UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO (UPW) filed a petition for a declaratory order with the Hawaii Labor Relations Board (Board). The UPW alleged that Hawaii Administrative Rules (HAR) § 12-42-129 requires public employer Department of Public Safety, State of Hawaii (PSD) to file with the Board PSD's Standards of Conduct and all applicable policy statements governing possible disciplinary actions to be taken against bargaining unit 10 employees, and that non-compliance with the rule renders enforcement and implementation of the policy statements null and void as being contrary to public policy.

For the reasons discussed below, the Board concludes that HAR § 12-42-129 requires PSD to file with the Board its Standards of Conduct and any other policy statements affecting public employee-management relations that are applicable to all employees of that public employer. The Board also concludes that the filing of such documents with the Board serves the purpose of providing the Board with reference materials to facilitate the Board's performance of duties pursuant to Hawaii Revised Statutes (HRS) § 89-5; the failure by a public employer to comply with HAR § 12-42-129 does not render enforcement or implementation of the Standards of Conduct or policy statements null and void.

FINDINGS OF FACT

1. The UPW and Intervenor HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) are employee organizations and exclusive representatives with the meaning of HRS § 89-2,¹ which represent the interests of public employees included in Units 01 and 10, and Units 02, 03, 04, 06, 08, 09, and 13, respectively.
2. Intervenor PSD and HARRY KIM, Mayor, County of Hawaii (County of Hawaii), are public employers within the meaning of HRS § 89-2.²
3. Intervenor Gordon Leslie (Leslie) is a public employee within the meaning of HRS § 89-2.³ Leslie is an adult corrections officer employed with PSD and a member of UPW.
4. UPW and the State of Hawaii were named as defendants in a civil action filed in the First Circuit Court alleging a violation of HAR § 12-42-129 in connection with a suspension and other disciplinary actions against Leslie pursuant to the Standards of Conduct issued by PSD.
5. HAR § 12-42-129 became effective on or about February 6, 1981, and states as follows:

§ 12-42-129 Statutes, ordinances, rules, regulations, orders, policies. The public employer shall file with the board, within

¹Pursuant to HRS § 89-2, "Exclusive representative" means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

²Pursuant to HRS § 89-2, "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education, the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid conflict.

³Pursuant to HRS § 89-2, "Employee" or "public employee" means any person employed by a public employer, except elected and appointed officials and other employees who are excluded from coverage in section 89-6(g).

thirty days after adoption and issuance, a copy of every statute, ordinance, rule, regulations, order, or policy statement affecting public employee-management relations applicable to all employees of such public employer.

6. On or about August 1, 1988, the State of Hawaii, Department of Corrections, promulgated "Standards of Conduct" applicable to government employees of the Department of Corrections.
7. The aforementioned Standards of Conduct have been ratified, adopted, issued and applied by PSD, which is the successor agency to the Department of Corrections.
8. At no time since August 1, 1988, to the present has the State of Hawaii ever filed with the Board as required by HAR § 12-42-129 its Standards of Conduct.
9. The Standards of Conduct constitute a policy statement affecting public employee-management relations applicable to employees of PSD in bargaining unit 10, including adult correctional officers.
10. The obligation to comply with HAR § 12-42-129 is imposed solely on a public employer, and the rule imposes no compliance obligations on an employee organization or public employee.
11. On or about June 12, 2007, Leslie filed a civil complaint (Complaint) in Civil No. 07-1-1047-06 KSSA in which he alleged, inter alia, that PSD violated HRS § 89-5 and HAR § 12-42-129. The UPW was also named as a defendant.
12. Leslie alleged that his due process rights were violated because the State of Hawaii failed to comply with HAR § 12-42-129, and had unlawfully disciplined him without forewarning or adequate notification and information as intended by HRS § 89-5.
13. On July 2, 2007, the UPW filed a Motion to Dismiss the Complaint. On July 25, 2007, the employer filed its Motion to Dismiss. On August 13, 2007, the Circuit Court held a hearing on the motions to dismiss, granting both motions in part and denying in part. All of Leslie's claims, with the exception of the failure to file the Standards of Conduct with the Board, were dismissed. On October 9, 2007, the Circuit Court ruled that it had concurrent jurisdiction over a request for declaratory judgment, and that the Board had primary jurisdiction to decide the issue.

14. On September 13, 2007, the UPW filed a petition for a declaratory order with the Board, alleging HAR § 12-42-129 requires PSD to file with the Board PSD's Standards of Conduct and all applicable policy statements governing possible disciplinary actions to be taken against bargaining unit 10 employees, and that non-compliance with the rule renders enforcement and implementation of the policy statements null and void as being contrary to public policy.
15. Also on September 13, 2007, the UPW filed a Memorandum of Points and Authorities in Support of Petition for Declaratory Ruling (Memorandum in Support).
16. On September 17, 2007, the Board sent a Notice of Filing of Petition for Declaratory Ruling; Notice of Deadline for Filing Petitions for Intervention; and Notice of Board Conference to Leslie, the public employers, and exclusive representatives. Interested persons wishing to intervene in the proceedings were given until 4:30 p.m. on October 3, 2007, to file a Petition for Intervention. The Board provided notice that a conference in this case would be held on October 11, 2007, at 9:00 a.m.
17. On September 27, 2007, HGEA filed a Petition for Intervention, asserting its interest based upon its right and obligation to protect and maintain the interests of its members in its collective bargaining agreements, Chapter 89, HRS, the State Constitution, and Chapter 658A, HRS.
18. On October 2, 2007, PSD filed its Petition for Intervention, asserting its interest as a public employer with rights under Chapter 89, HRS.
19. On October 3, 2007, the County of Hawaii filed its Petition for Intervention, asserting its interest as a public employer to have the ability to discipline employees if the necessary statements have not been filed with the Board.
20. On October 9, 2007, the Board granted the Petitions for Intervention by HGEA, PSD, and the County of Hawaii, as they have interests which could be affected by the Board's ruling in this case.
21. On October 10, 2007, Leslie filed a Petition for Intervention, asserting that PSD violated his rights when he was suspended by PSD's internal management rule or the Standards of Conduct. Leslie also asserted that he has a claim in the circuit court that could be affected by the Board's decision.

22. At the Board's conference on October 11, 2007, the parties' counsel had no objections to Leslie's intervention in this case despite the late filing of his Petition for Intervention.
23. On October 12, 2007, the Board granted Leslie's Petition for Intervention, and set a schedule for briefing deadlines: the UPW to file a supplemental brief by November 9, 2007; responsive memoranda to be filed by December 10, 2007; and UPW's reply brief to be filed by January 10, 2008.
24. On October 13, 2007, UPW filed its Supplemental Memorandum in Support of Petition for Declaratory Ruling and Order. On November 8, 2007, the UPW filed its Supplemental Submission in Support of Petition for Declaratory Ruling and Order.
25. On December 10, 2007, PSD filed its Memorandum in Opposition to UPW's Petition for Declaratory Ruling and Order (Memorandum in Opposition). Also on December 10, 2007, the County of Hawaii filed its substantive joinder to PSD's Memorandum in Opposition.
26. On December 28, 2007, Leslie filed his Plaintiff's Memorandum in Support of Declaratory Ruling and Order. On December 31, 2007, Leslie filed an amended Plaintiff's Memorandum in Support of Declaratory Ruling and Order.
27. On January 9, 2008, UPW filed its Reply Brief in Support of Petition for Declaratory Ruling and Order.
28. On March 13, 2008, Leslie filed his Plaintiff's Motion to Enforce the Order and Judgment in the Truth Affidavit of Gordon Leslie.

DISCUSSION AND CONCLUSIONS OF LAW

1. The Board has jurisdiction over this petition pursuant to HRS §§ 89-5(b)(5) and 91-8, and HAR § 12-42-9.
2. HAR § 12-42-129 provides:

Statutes, ordinances, rules, regulations, orders, policies. The public employer shall file with the board, within thirty days after adoption and issuance, a copy of every statute, ordinance, rule, regulations, order, or policy statement affecting

public employee-management relations applicable to all employees of such public employer.

3. HAR § 12-42-129 itself is silent as to what effect, if any, failure to comply would have on the statute, ordinance, rule, regulation, order, or policy statement that was not filed with the Board.
4. Courts sometimes look to relevant legislative history to determine the purpose of a statute. See, e.g., State v. Wells, 78 Hawai'i 373, 376, 894 P.2d 70, 73 (1995). For this proceeding, the Board attempted to locate records of the administrative rule's administrative history.
5. The Board does not have records relating to the administrative history of HAR § 12-42-129, and no records or other information regarding the rule's administrative history have been provided by the parties; accordingly, the Board is unable to determine the intended effect of the rule from its history.
6. HRS § 1-16 provides that, "[l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." Applying this principle to administrative rules, the Board examined all of its rules to aid in the construction of HAR § 12-42-129.
7. The Board's rules do not provide for any penalty for failure to comply with the requirements of HAR § 12-42-129. The Board's rules do contain provisions governing decisions and orders, and enforcement of orders, but those rules govern proceedings not at issue here – prohibited practice complaints [HAR §§ 12-42-50 and -51]; strikes [HAR § 12-42-88]; financial reports of employee organizations [HAR § 12-42-114]; and service fee rebates to non-members by unions [HAR § 12-42-144].
8. As part of the Rules of General Applicability, HAR § 12-42-3 provides (emphasis added):

Subchapters.

- (a) Each of the subchapters sets forth special rules applicable to the type of proceeding described in the caption of the subchapter.
- (b) This subchapter sets forth general rules applicable to all proceedings conducted pursuant to chapter 89, HRS, and

should be read in conjunction with the subchapter governing the particular proceeding.

- (c) In any conflict between a general rule in this subchapter and a special rule in another subchapter, the special rule shall govern.

- 9. Subchapter 9, the subchapter that contains HAR § 12-42-129, is entitled "Reference Materials Pursuant to Section 89-5, HRS" and includes §§ 12-42-126 - 135. HAR § 12-42-126 provides:

This subchapter governs the filing of all reference materials pertaining to public employee-management relations pursuant to section 89-5, HRS.

- 10. Accordingly, the language of Subchapter 9 indicates to the Board that the filing of statutes, ordinances, rules, regulations, order, or policy statements, is solely to provide the Board with reference materials.

- 11. Additionally, the authorizing statute for HAR § 12-42-129 is HRS § 89-5. HRS § 89-5 governs the functions of the Board generally, including its creation, composition, duties of Board members, administrative attachment to the Department of Labor and Industrial Relations, and specifically provides the following powers and functions:

- (A) Establish procedures for, investigate, and resolve, any dispute concerning the designation of an appropriate bargaining unit and the application of section 89-6 to specific employees and positions;
- (B) Establish procedures for, resolve disputes with respect to, and supervise the conduct of, elections for the determination of employee representation;
- (C) Resolve controversies under chapter 89;
- (D) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper;
- (E) Hold such hearings and make such inquiries, as it deems necessary, to carry out properly its functions and powers,

and for the purpose of such hearings and inquiries, administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence, compel attendance of witnesses and the production of documents by the issuance of subpoenas, and delegate such powers to any member of the Board or any person appointed by the Board for the performance of its functions;

- (F) Determine qualifications and establish, after reviewing nominations submitted by the public employers and employee organizations, lists of qualified persons, broadly representative of the public, to be available to serve as mediators or arbitrators;
- (G) Establish a fair and reasonable range of daily or hourly rates at which mediators and arbitrators on the lists established under the preceding paragraph are to be compensated;
- (H) Conduct studies on problems pertaining to public employee-management relations, and make recommendations with respect thereto to the legislative bodies; request information and data from state and county departments and agencies and employee organizations necessary to carry out its functions and responsibilities; make available to all concerned parties, including mediators and arbitrators, statistical data relating to wages, benefits, and employment practices in public and private employment to assist them in resolving issues in negotiations;
- (I) Adopt rules relative to the exercise of its powers and authority and to govern the proceedings before it in accordance with chapter 91; and
- (J) Execute all of its responsibilities in a timely manner so as to facilitate and expedite the resolution of issues before it.

12. HRS § 89-5, the statute authorizing HAR § 12-42-129, does not provide any indication that failure to comply with the rule was intended to nullify any statute, ordinance, rule, regulations, order, or policy statement; rather, the statute governs the Board's functions generally, and thus the "reference materials" that are to be provided to the Board pursuant to HAR § 12-42-129

are intended for the Board's benefit, to facilitate the carrying out of the Board's functions and responsibilities.

13. Pursuant to subchapter 9, other reference materials that are to be provided to the Board, either upon request by the Board or summarily by rule, include union constitutions, charters, and by-laws [HAR § 12-42-127]; collective bargaining agreements [HAR § 12-42-128]; information and data pertaining to public employee-management relations necessary for the Board to carry out its functions and responsibilities [HAR § 12-42-130]; and statistical data relating to wages, benefits, and employment practices in public employment [HAR § 12-42-131]. Again, the Board views the filing of this information as reference material to facilitate the carrying out of the Board's functions and responsibilities, and a party's failure to comply would not invalidate or render null and void any of these other reference materials.
14. The violation of HAR § 12-42-129 at issue here does not render the Standards of Conduct unenforceable as contrary to public policy. First, the Board recognizes that discipline cases such as Leslie's can be grieved and arbitrated. Arbitrators generally place the burden of proof on the Employer to demonstrate that just cause existed for the disciplinary action, and include as one factor the question of whether the employee had forewarning or foreknowledge of the possible consequences of the employee's conduct. See Enterprise Wire, 46 L.A. 359 (1966). Should an employer fail to comply with HAR § 12-42-129, it may deprive the employer of an additional opportunity to demonstrate that an employee was given adequate forewarning of a policy, rule, or regulation; however, that is a gamble the employer takes in failing to comply with the rule. In the present case, the arbitrator who heard Leslie's grievance found that Leslie was aware of the Standards of Conduct and that he could be punished if he violated them. The arbitrator also found that the union and employer had conducted negotiations concerning the adoption and implementation of the Standards of Conduct. Accordingly, the Board cannot conclude that the Standards of Conduct are unenforceable as contrary to public policy.
15. Additionally, the Unit 10 collective bargaining agreement contains section 15.09 which entitles a grieving party and/or the union to obtain information needed in connection with the processing of a grievance. Furthermore, pursuant to the Uniform Information Practices Act (UIPA), Chapter 92F, HRS, government agencies must make available for public inspection and duplication during regular business hours, inter alia, rules of procedure, substantive rules of general applicability, statements of general policy, and interpretations of general applicability adopted by the agency. The UIPA also contains provisions for judicial enforcement and alternative method to appeal

a denial of access. Accordingly, there are other avenues to obtain the information governed by HAR § 12-42-129 such that failure to comply with that rule does not constitute a denial of due process or violation of public policy.

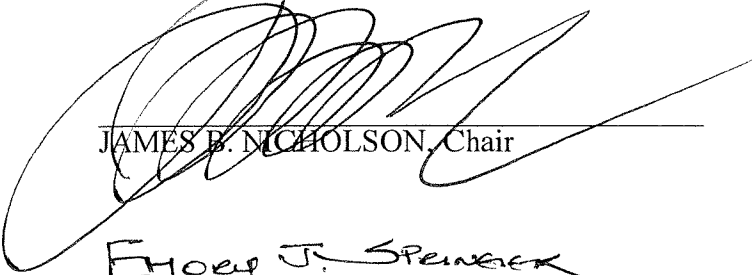
16. For the reasons discussed above, the Board concludes that HAR § 12-42-129 requires PSD to file with the Board its Standards of Conduct and any other policy statements affecting public employee-management relations that are applicable to all employees of that public employer. The Board also concludes that the filing of such documents with the Board serves the purpose of providing the Board with reference materials to facilitate the Board's performance of duties pursuant to HRS § 89-5; the failure by a public employer to comply with HAR § 12-42-129 does not render enforcement or implementation of the Standards of Conduct or policy statements null and void.

DECLARATORY ORDER

HAR § 12-42-129 requires public employers to file with the Board their statutes, ordinances, rules, regulations, orders, or policy statements affecting public employee-management relations applicable to all employees of such public employer, including PSD's Standard of Conduct. The filing of such documents with the Board serves the purpose of providing the Board with reference materials to facilitate the Board's performance of duties pursuant to HRS § 89-5. The failure by a public employer to comply with HAR § 12-42-129 does not render enforcement or implementation of the statutes, ordinances, rules, regulations, orders, or policy statements, including PSD's Standards of Conduct, null or void.

DATED: Honolulu, Hawaii, April 3, 2008.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

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